Supreme Court, U.S.
FILED

991866 MAY 22 2000

OFFICE OF THE CLERK

No.

In the
Supreme Court of the United States

ROCCO ERNEST INFELISE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

ALLAN A. ACKERMAN, Esq.
Counsel of Record
2000 N. Clifton Avenue
Chicago, Illinois 60614
(312) 332-2891

Attorney for Petitioner

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

74pp

QUESTIONS PRESENTED

1. Certiorari should be granted, the judgment below vacated and the case remanded because the district court's procedural bar § 2255 rejection conflicts with the Court's 28 U.S.C. § 2253(c) Certificate of Appealability analysis in *Slack v. McDaniel*, 529 U.S. ___, 120 S.Ct. ___ (No. 98-6322; April 26, 2000).

(a) Certiorari should be granted because the court below did not have the benefit of the Court's intervening "contrary to" or "unreasonable application of" holding in *Williams v. Taylor*, 529 U.S. ___, 120 S.Ct. 1495 (2000) (O'Connor, J.).

2. Whether, in light of settled Supreme Court precedent, the failure to hold an evidentiary hearing on petitioner's Sixth Amendment assertions that the government intentionally intruded on his attorney-client pretrial preparation conversations, rises to the level of a miscarriage of justice?

(a) Whether review should be granted to resolve the circuit split regarding if there is per se prejudice where [a] petitioner presents credible evidence that the government purposefully intruded into pretrial attorney-client preparation-communications?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT 3

REASONS FOR GRANTING THE WRIT 13

CONCLUSION 23

APPENDIX ..... *infra*

TABLE OF AUTHORITIES

Cases	PAGE(S)
Alderman, et al. v. United States, 394 U.S. 165, 89 S.Ct. 961 (1969)	18
Black v. United States, 385 U.S. 26, 87 S.Ct. 190 (1966)	17, 21
Briggs v. Goodwin, 698 F.2d 486 (DC Cir. 1982); on rehearing, 712 F.2d 1444 (DC Cir. 1993), *cert. denied*, 464 U.S. 1040 (1984)	21
Coplon v. United States, 191 F.2d 749 (DC Cir. 1951)	21
Cutillo v. Cinelli, 485 U.S. 1037, 108 S.Ct. 1600 (1988)	20
Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457 (1942)	21
Kolod v. United States, 390 U.S. 136, 88 S.Ct. 752 (1968)	19
Maine v. Moulton, 474 U.S. 159, 106 S.Ct. 477 (1985)	16, 17
Murphy v. Waterfront Com'n of New York Harbor, 378 U.S. 52, 84 S.Ct. 1594 (1964)	22
O'Brien et al. v. United States, 386 U.S. 345, 87 S.Ct. 1158 (1967)	17, 18, 21

Shillinger v. Haworth, 70 F.3d 1132
(10th Cir. 1995) 20

Slack v. McDaniel, 529 U.S. ___, 120 S.Ct. ___
(No. 98-6322; April 26, 2000) . . . . . i, 13, 14, 15

Strickland v. Washington, 466 U.S. 668,
104 S.Ct. 2052 (1984) 16

Tuite, et al. v. Henry, et al., 98 F.3d 1411
(DC Cir. 1996) 11, 12, 14

United States v. Coplon, 185 F.2d 629
(2nd Cir. 1950) 19, 22

United States v. Costanzo, 740 F.2d 251
(3rd Cir. 1984), *cert. denied*, 472 U.S.
1017 (1985) 20

United States v. Davis, 646 F.2d 1298
(8th Cir. 1981) 21

United States v. DiDomenico, et al., 78 F.3d
294 (7th Cir. 1996), *cert. denied*,
519 U.S. 1006 (1996) 22

United States v. Glover, 596 F.2d 857
(9th Cir. 1979), *cert. denied*, 444 U.S.
857 and 444 U.S. 860 (1979) 21

United States v. Goldstein, 120 F.2d 485
(2nd Cir. 1941) 22

United States v. Levy, 577 F.2d 200
(3rd Cir. 1978) 20

United States v. Mastroianni, 749 F.2d 900 (1st Cir. 1984) 21

United States v. Morales, 635 F.2d 177 (2nd Cir. 1980) 21

United States v. Morrison, 449 U.S. 361 (1981) 18

United States v. Steele, 727 F.2d 580 (6th Cir. 1984), *cert. denied*, 467 U.S. 1209 (1984) 21

Williams v. Taylor, 529 U.S. ___, 120 S.Ct. 1495 (2000) . . . . . i, 13, 15

Constitution, Statutes and Rules

United States Constitution, Fifth Amendment 2

United States Constitution, Sixth Amendment . . . 2

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2253 2

28 U.S.C. § 2515 . . . . . 2, 3

To the Honorable Chief Justice and the Associate Justices of the Supreme Court.

Petitioner Rocco E. Infelise (petitioner) respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on March 1, 2000.

OPINIONS BELOW

The memorandum order of the United States Court of Appeals for the Seventh Circuit, denying petitioner's request for a Certificate of Appealability (hereafter COA), was filed on March 1, 2000 (App. 1-2, *infra*). The district court's unpublished opinion and judgment denying relief pursuant to 28 U.S.C. § 2255 was filed on January 5, 1999, and is reproduced at App. 3-22, *infra*. The district court's order denying petitioner's COA request was filed on February 8, 1999 (App. 23-25, *infra*).

JURISDICTION

The memorandum order denying petitioner's request for a COA was issued by a panel of the United States Court of Appeals for the Seventh Circuit on March 1, 2000 (App. 1-2, *infra*). No petition for rehearing was submitted. This petition for writ of certiorari follows within ninety days, and this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, in part, states:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the United States Constitution, in part, states:

> In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.

28 U.S.C. § 2253, in pertinent part, provides:

> § 2253. Appeal
>
> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall he subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right . . .

18 U.S.C. § 2515 states:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived there-

from may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

STATEMENT

Introduction:

Petitioner, a World War II veteran, is 76 years old and is serving the functional equivalent of a federally imposed life sentence. Since September 1991, he has continually contended that he and his attorneys were the subject of illegal federal eavesdropping. Within this certiorari petition, petitioner seeks vacation of the order below denying an evidentiary hearing on the sole question of whether petitioner and his attorney were unlawfully intruded upon by the federal government while preparing for his 1991 jury trial.

1. On February 6, 1990, petitioner and others were charged in Indictment 90 CR 87, in Chicago with, *inter alia*, conspiracy, racketeering and gambling offenses. The substance of the multi-count indictment charged petitioner and others with illegal activities involving organized crime in the Chicago area from the 1970s to and including February 1990. Petitioner was detained pending trial.

2. Within the fabric of pretrial discovery, the government made available approximately 5,000 Title III and consensual tape recordings (made between 1983 and

1989) involving petitioner and others. To facilitate pretrial preparation, the district court ordered that a secure room on the nineteenth floor in the federal Metropolitan Correctional Center (MCC), Chicago, be set aside for the exclusive use of petitioner, his several co-indictees and defense attorneys. The district court directed the government to install *listening equipment* so that the tapes (and transcripts) could be analyzed, compared and indexed. The government-supplied equipment lacked *recording capacity*.

From the late spring of 1990 through late August 1991, petitioner, co-indictees and defense attorneys met, at least twice weekly, in the *presumptively* secured MCC room for trial preparation purposes. The government assured the district court and the defense that there were no eavesdropping devices in the room.[1] During the [at least] twice-weekly conferences, trial strategy was reviewed, assessed and refined. Occasionally, attorneys for the non-custodial co-indictees joined the custodial defendants at the MCC in order to facilitate joint defense trial preparation.

The defense team also leased an office at 19 West Jackson, Chicago (also known as the "tape room"), across from the U.S. District Court, which was used as the central depository for the 5,000 tapes, transcripts and additional discovery materials. All defense attor-

---

[1] Consolidated pretrial defense motions requested written assurances from the government that the preparatory trial area was not the subject of government eavesdropping. In part, the government's written response included "there is no audio or video monitoring system or device in this room. Counsels' paranoia, whether real or dramatic, is wholly unwarranted"; R.792, pg. 2, n. 3.

neys and the non-custodial co-indictees utilized the office for joint trial preparation conferences and strategy meetings.

3. *The discovered intrusion and subsequent events.*

During late August 1991, cassette tape recordings were surreptitiously delivered by unknown persons to defense attorneys representing three of petitioner's co-indictees. The cassette recordings captured conversations between the petitioner, other custodial co-indictees and defense attorneys that had taken place in the secure[d] custodial MCC trial-preparation room.

The defense attorneys immediately delivered the cassette tapes to the Chief Judges of the Seventh Circuit and United States District Court in Chicago.[2] At the direction of [then] Chief Judge Bauer of the Seventh Circuit, the tapes were delivered to the United States Attorney in Chicago. The secured MCC room that had been used for trial preparation was immediately sealed and the Department of Justice (DOJ), through the Office of Professional Responsibility (OPR) commenced an investigation.

(a) On September 5, 1991, petitioner, and his co-indictees sought a trial continuance (the trial was set to commence September 17, 1991). Petitioner contended that he was entitled to learn the nature and extent of the electronic intrusions prior to proceeding with his trial (Tr. of 9/5/91 at pp. 5, 9-19). The district court

---

[2] The district court correctly noted that after the defense attorneys received copies of the tapes, they immediately notified the Chief Judges as well as the United States Attorney in Chicago (R. 839, p. 1).

held that lacking allegations that the government prosecution team obtained or used any information that may have been gleaned from the cassette tapes, there was no need to adjourn the trial setting. *Id.* at 22-23. Nonetheless, the district court continued the trial from September 17 to October 1, 1991. *Id.* at 24.

(b) On September 12, 1991, petitioner, his co-indictees and counsel appeared before the district court. The government advised the district court that the DOJ investigation (which OPR commenced on September 17), would take between thirty and forty-five days (Tr. of 9/12/91 at p. 6). The district court ascertained that four tapes had been delivered to three defense attorneys. *Id.* The government contended that petitioner had failed to assert that either the government trial prosecutors and/or agents were responsible for the taping. *Id.* at 10. The district court took the position that prosecutorial team "taint" was the only impacting issue: Was taped information passed to the government trial team? *Id.* at 11-12; 18, 29-30, 34-36. Agreeing that a DOJ investigation would take thirty to forty-five days, but holding to the October 1 trial date, the district court ordered that petitioner and his co-indictees be transported by either the U.S. Marshal's Service, or a security company employed by the Marshal's Service, each morning to defense attorney offices for trial preparation, and returned to the MCC each afternoon. In addition, petitioner and his co-indictees were to be brought to a "tape room" at 19 West Jackson for the purpose of listening to, analyzing and cataloguing the several thousand taped conversations. *Id.* at 12; R. 809. In connection with proposed "taint" [attorney-defendant eavesdropping or bugging] hearings, the district court stated:

> . . . If we're done with the trial of the case and some of these defendants are convicted *and that's when the investigation is over*, I will take a motion for NOV to set aside the judgment and I will set it aside.

Tr. 9/12/91 at p. 13 (ital.emph. added).

> And I recognize that this is a burden on the government, *but this tape was made in a government facility, at the MCC.*

Tr. 9/12/91 at p. 15 (ital.emph. added).

(c) On September 20, 1991, defense attorneys presented the district court with a report from a former federal investigator, which preliminarily found the taping to have all the earmarks of a professionally trained eavesdropper (R. 822; App. 26-36, *infra*).[3] Ultimately, the district court agreed to hold a hearing ". . . *whenever the investigations are done* . . ." (Tr. 9/20/91 at p. 35; Pet.'s emph.).

Trial counsel for the government urged trial date retention, asserting that the only hearing needed was to determine whether the government profited from the tapes—leaving to another day the matters of (1) who did the taping, and (2) whether the defense could show prejudice (R. 770, Tr. 3-4). According to the govern-

---

[3] The affiant, Barry Cauley, had been a chief law enforcement investigator for the government prior to opening an electronic surveillance company in Dallas, Texas. He had nineteen years of law enforcement experience in the area of electronic surveillance. *Inter alia*, his preliminary report surmised that at least two systems were installed for surreptitious recordings, and noted that it was normal practice for trained law enforcement eavesdroppers to use two systems, one acting as a backup (R. 822 at ¶ 16(a)).

ment, the defense had the burden of demonstrating intentional intrusion-plus-prejudice. *Id.* at 18-19. The district court adopted that position. *Id.* at 20. The DOJ/OPR attorneys from Washington, DC advised the district court that their goal was to complete their investigation before November 1, 1991. *Id.* at 30. The district court noted that at whatever point the defense wanted a "full blown" hearing, [the] government (no-taint) affidavits could be challenged. *Id.* at 39 (the government prosecution team filed affidavits denying any knowledge of any MCC eavesdropping).

Petitioner challenged the district court's ruling (trial before eavesdropping hearing), asserting that the investigation which led to 90 CR 87 had gone on for several years prior to indictment, but petitioner and his attorneys were afforded only two weeks to probe the circumstances surrounding the attorney-client MCC eavesdropping (Tr. 42). The district court ultimately held that even if the taping occurred at the MCC, unless it could be pinned on individuals tied to the case who used or obtained the information, it was unimportant (Tr. 45).

On September 25, 1991, the district court filed its memorandum order denying petitioner's request to continue the trial date (R. 839, p. 14-15). While noting a split-in-circuits on the issue of prosecutorial intrusion, the district court ruled that the intrusion needed a direct nexus to the prosecutorial team. *Id.* Since the petitioners were not able to supply that linkage, no further inquiry was needed (R. 839, at pp. 11-12). The district court's reasoning included:

> Although the court has not heard the tape, for purposes of this motion, the court will deem

> counsels' representations sufficient to establish that the conversation was taped in the 19th floor conference room. However, even if the taping did occur at the MCC, that does not prove that anyone from the prosecution team taped the defendants. *In other words, even if someone employed by the government did tape the defendants, it is not relevant to the instant case unless the government employee is an attorney or agent assigned to this case or unless the contents of the tapes were communicated to an attorney or agent assigned to this case.*

R. 839, p. 11; 9/25/91; ital.emph. added.

The district court eschewed deciding whether the OPR report (due November 1) would be made available to the defense in support of its intentional governmental intrusion stance (Tr. 15).

4. *Trial.*

During early October 1991, with the MCC attorney-defendant bugging issue unresolved, an anonymous jury was empaneled. On March 10, 1992, the jury returned mixed verdicts against petitioner and others.

5. *Post-Trial.*

(a) *The DOJ Report.* In February 1992, with petitioner's trial still in progress, the district court advised all parties that the DOJ/OPR investigation (originally promised for completion by November 1991) was still ongoing (R. 1236). During September 1992, several months after mixed verdicts were returned, the district court notified the parties that she expected the DOJ/OPR eavesdropping report to be filed by September 11, 1992 (under seal), and the district court would then

determine whether to disclose the results to petitioner and counsel (R. 1461).

On September 24, 1992 the district court, again noting that the circuits were divided, filed a memorandum order denying any eavesdropping-evidentiary hearing (R. 1482 at pp. 2-3). The district court concluded that since petitioner had not shown illegal taping by the *prosecutorial team*, the government had no burden of explanation. *Id.* at pp. 5-6. The district court's memorandum order noted that the DOJ/OPR investigation was still *incomplete and inconclusive*. *Id.* at 8. The district court noted that after the final report was received, the defendants could refile a motion for indictment dismissal. *Id.* at 8, n. 9. The DOJ/OPR final report was finally filed with the district court on February 23, 1994, and, according to the district court, the final report was "inconclusive" (R. 2009). Petitioner's DOJ/OPR report disclosure requests were denied and no evidentiary hearing has ever been held (R. 1856, 1862, 2029, 2032, 2034).

(b) *Companion FOIA Proceedings*

In 1993, petitioner, several co-indictees and their attorneys, filed an illegal eavesdropping civil suit in the United States District Court, Chicago, under the name and style *Tuite, et al. v. Henry, et al.*, 93-C-3248. The attorneys representing the plaintiffs filed a subpoena seeking DOJ/OPR report disclosure. The government declined to disclose the report, and the plaintiffs filed a separate subpoena enforcement action for the DOJ/OPR report in the U.S. District Court, District of Columbia (Mis. No. 94-268; Lamberth, J.). While denying subpoena enforcement, Judge Lamberth's factual findings included:

> Plaintiffs allege that while meeting with their imprisoned clients in a Court-Ordered Room at the Chicago Metropolitan Correctional Center ("MCC"), confidential attorney-client conversations discussing defense strategy were unlawfully tape recorded without the consent or knowledge of the attorneys or their clients. *Overwhelming circumstantial evidence indicates that MCC officials or employees "bugged" the Court-Ordered Room. It would be nearly impossible for anyone to have access into the prison without the knowledge of the prison guards. Anyone entering MCC had to pass through metal detectors and was subject to searches. Plaintiffs claimed their bags were examined and they were asked to sign a card, subjecting them to penalties for false statements, affirming that they were not bringing objects, including recording devices, into the prison. Access to the Court-Ordered Room involved the attorneys entering an elevator which was controlled solely by the guards, as well as a series of man-trap doors. Prisoners exiting the Court-Ordered Room were strip-searched, including body-cavity searches. Additionally, an acoustical investigation revealed that the tape recorder was most likely placed in a plenum ventilation duct above the Court-Ordered Room, access to which, without the knowledge of MCC officials, would be highly unlikely.*

Tuite v. Henry, et al., Mis. No. 94-268 at pg. 2; including n. 4 (ital.emph. added).[4]

---

[4] On appeal, the D.C. Circuit Court of Appeals reversed and remanded, *Tuite v. Henry*, 98 F.3d 1411 (DC Cir. 1996). On remand, the district court adhered to its earlier decision denying subpoena enforcement and the Court of Appeals affirmed the district court decision, No. 98-5440 (unpublished).

6. Petitioner timely filed his § 2255 petition asserting, *inter alia*, that his conviction and sentence was tainted by unlawful eavesdropping on his attorney-client communications while he was incarcerated and awaiting trial at the MCC-Chicago. The district court acknowledged that petitioner was now able to present an affidavit from Daniel Otto, who during September 1991, worked for a private security company that had been hired by the U.S. Marshal's Service to transport petitioner to defense attorney offices and the leased office space at 19 West Jackson, during September 1991 (App. 37-40). Additionally, by virtue of limited government disclosures made in the *Tuite, et al. v. Henry, et al.*, civil actions, petitioner was able to produce an FBI 302 report, incorporating a statement from a former MCC federal security guard (App. 42-44). Notwithstanding the now-available supporting documents, the district court held that petitioner was procedurally barred from pursuing his Sixth Amendment issue within the fabric of his § 2255 filings (App. 12-16). The district court's January 5, 1999 memorandum opinion, explained:

> Defendants, however, repeatedly delayed the evidentiary hearing and did not again request the hearing until four months after the jury found them guilty and ten months after the originally scheduled hearing date. *See Id.* at 300. In these circumstances, Infelise has failed to show that due diligence on his part could not have revealed this evidence prior to trial.

App. 16, *infra*.

The district court's reasoning stands in stark contrast to its September 24, 1992 order which explained that

after the final report [DOJ/OPR] was received, the defendants could refile a motion for indictment dismissal (R. 1482 at pg. 8, n. 9). That report, deemed "inconclusive" by the district court was ultimately filed some eighteen months later (February 23, 1994; R. 2009). Petitioner's tenacious district court disclosure requests were denied and no evidentiary hearing [has] ever been held (R. 1856, 1862, 2029, 2032, 2034). As indicated *ante*, the court of appeals, declined petitioner's COA request (App. 1-2).

REASONS FOR GRANTING THE WRIT

1. Certiorari should be granted, the judgment below vacated and the case remanded because the district court's procedural bar § 2255 rejection conflicts with the Court's 28 U.S.C. § 2253(c) Certificate of Appealability analysis in *Slack v. McDaniel*, 529 U.S. ___, 120 S.Ct. ___ (No. 98-6322; April 26, 2000).

(a) Certiorari should be granted because the court below did not have the benefit of the Court's intervening "contrary to" or "unreasonable application of" holding in *Williams v. Taylor*, 529 U.S. ___, 120 S.Ct. 1495 (2000) (O'Connor, J.).

2. Whether, in light of settled Supreme Court precedent, the failure to hold an evidentiary hearing on petitioner's Sixth Amendment assertions that the government intentionally intruded on his attorney-client pretrial preparation conversations, rises to the level of a miscarriage of justice?

(a) Whether review should be granted to resolve the circuit split regarding if there is per se prejudice where

[a] petitioner presents credible evidence that the government purposefully intruded into pretrial attorney-client preparation-communications?

1. Petitioner is seeking certiorari on the question of whether he should have the benefit of an evidentiary hearing, on his Sixth Amendment government intrusion eavesdropping issue, predicated on his § 2255 arguments, exhibits and the district court's factual findings in *Tuite v. Henry*, *ante,* at pg. 11. In summary, petitioner contends that he, his co-indictees and defense attorneys were exposed to unlawful government eavesdropping, while preparing for trial during 1991, at the Federal Correctional Center (MCC) in Chicago, Illinois. The district court, absent the benefit of the Court's *Slack v. McDaniel* decision, ruled that petitioner's illegal eavesdropping argument was procedurally barred, App. 14-16, *infra*. In *Slack*, Justice Kennedy, for the Court, explained:

> The issue becomes somewhat more complicated where, as here, the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. This construction gives meaning to Congress' requirement that a prisoner demonstrate substantial underlying constitutional claims and is in conformity with the meaning of

> the "substantial showing" standard provided in *Barefoot, supra*, at 893, and n. 4, and adopted by Congress in AEDPA.

529 U.S. at ___, 120 S.Ct. ___, Slip Op. at 8.

In Justice O'Connor's opinion for the Court in *Williams v. Taylor*, 529 U.S. ___, 120 S.Ct. 1495 (2000), she explained when, and under what circumstances the federal habeas court can grant habeas claims which were adjudicated on the merits in State court:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

120 S.Ct. at 1523.

Petitioner contends that his § 2255 filings clearly demonstrated the denial of a constitutional right and that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Further as demonstrated *infra*, the decision below conflicts with Judge O'Connor's opinion for the Court in *Williams v. Taylor*, because § 2255 rejection is both contrary to and comprises an unreasonable application of settled Supreme Court precedent.

In light of the Court's recent holdings in both *Slack v. McDaniel* and *Williams v. Taylor*, certiorari should

be granted, the judgment below vacated and the case remanded to afford the court below an opportunity to analyze petitioner's claims in light of the impacting-intervening Court precedent.

2. *The Sixth Amendment.* Petitioner has a clear Sixth Amendment guarantee to the effective assistance of counsel, which incorporates essential communication between counsel and defendant, see *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984) (The reasonableness of counsel's actions may be determined or substantially influenced by the *defendant's own statements* or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and *on information supplied by the defendant*) (466 U.S. at 691; ital.emph. added).

In *Maine v. Moulton*, 474 U.S. 159, 106 S.Ct. 477 (1985), the Court affirmed the granting of habeas relief, while reviewing the intentional post-indictment intrusion into the attorney-client privilege. Justice Brennan delivered the Court's opinion, explaining:

> Once the right to counsel has attached and been asserted, the State must of course honor it. This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance. We have on several occasions been called upon to clarify the scope of the State's obligation in this regard, *and have made clear that, at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby*

> *dilutes the protection afforded by the right to counsel.*

474 U.S. at 170-171; fn. 7 omitted; ital.emph. added.

In *Black v. United States*, 385 U.S. 26, 87 S.Ct. 190 (1966), the Court vacated the denial of certiorari and remanded *Black's* case for a new trial. Black and his attorney had been overheard by the government in an unrelated investigation. The solicitor general advised the Court that nothing from that overhear related to Black's tax evasion case, and suggested that the conviction be vacated and remanded to the district court for an evidentiary hearing. The Court held otherwise:

> In view of these facts it appears that justice requires a new trial be held so as to afford the petitioner an opportunity to protect himself from the use of evidence that might be otherwise inadmissible.

385 U.S. at 28-29.[5]

In *O'Brien et al. v. United States*, 386 U.S. 345, 87 S.Ct. 1158 (1967), the Court granted *O'Brien* a new trial predicated on *Black*.[6] Again, Justices Harlan and Stewart dissented, contending that where the contents of the eavesdropping or wiretapping were not communi-

---

[5] Justice Harlan's dissent, noted that none of the content of the impermissible eavesdropping was communicated to the prosecuting attorneys, thus remandment for an evidentiary hearing, and not the granting of a new trial, was the correct disposition, 385 U.S. at 31.

[6] Justice Harlan's dissent noted that none of the eavesdropping content was communicated to the government's prosecuting attorneys. Hence, a new trial was not required, 87 S.Ct. at 1158. In *O'Brien*, the government requested remandment for an evidentiary hearing. The Court opted for trial anew.

cated outside of the F.B.I., an evidentiary hearing should ensue, [but] not an automatic new trial, 386 U.S. at 346-47.

In *United States v. Morrison*, 449 U.S. 361, 101 S.Ct. 665 (1981), the Court vacated the Sixth Circuit's indictment dismissal order, finding that the appellate remedy for a Sixth Amendment violation was *indecorous* under the circumstances. Justice White, for the full Court, explained:

> In *Black v. United States*, 385 U.S. 26, 87 S.Ct. 190, 17 L.Ed.2d 26 (1966), and *O'Brien v. United States*, 386 U.S. 345, 87 S.Ct. 1158, 18 L.Ed.2d 94 (1967), law enforcement officers improperly overheard pretrial conversations between a defendant and his lawyer. None of these deprivations, however, resulted in the dismissal of the indictment. Rather, the conviction in each case was reversed and the Government was free to proceed with a new trial.

449 U.S. at 365 (emphasis added).[7]

Petitioner is seeking an evidentiary hearing, and the disclosure of the DOJ/OPR 1994 report (not indictment dismissal).[8]

---

[7] *Morrison's* reference to *Black* and *O'Brien* demonstrate their continued viability.

[8] Petitioner's disclosure assertions are consistent with the Court's decision in *Alderman v. United States*, 395 U.S. 165, 182, 89 S.Ct. 961 (1969), which rejected the notion that [the] district court's *in camera* review of eavesdropping related materials was constitutionally adequate ("And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances. Unavoid-

(continued...)

The Sixth Amendment's constitutional premise embraces petitioner's right to be free from prosecutorial intrusion into attorney-petitioner pretrial and trial preparation. Hence *Morrison*, blended with *Black, O'Brien, Kolod* and *Alderman*, advances exactly that which has heretofore been denied: Petitioner's entitlement to an evidentiary hearing.[9]

---

[8] (...continued)
ably, this is a matter of judgment, but in our view the task is too complex, and the margin for error too great, to rely wholly on the in camera judgment of the trial court to identify those records which might have contributed to the government's case."); in accord, *United States v. Coplon*, 185 F.2d 629, 638 (2nd Cir. 1950) (L. Hand, J.) (*In the case at bar it may seem to have been a flimsy grievance to deny to Judith Coplon the opportunity to argue that these records did "lead," or might have "led," to her conviction; in truth it is extremely unlikely that she suffered the slightest handicap from the judge's refusal. But we cannot dispense with constitutional privileges because in a specific instance they may not in fact serve to protect any valid interest of their possessor . . . Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens.*).

[9] In *Kolod v. United States*, 390 U.S. 136, 88 S.Ct. 752 (1968), the Court found that conviction vacation and remand for an evidentiary hearing were required under circumstances where the government, *sub silentio*, acknowledged having eavesdropped on one of the petitioners. The government asserted that the information obtained was not arguably relevant to the prosecution, 88 S.Ct. at 753. The Court found the government's *ex parte* relevancy determination unavailing and remanded for an adversary hearing.

2(a). *Circuit discord and burden shifting.*

The lack of circuit harmony is clear from Justice White's dissent from the denial of certiorari in *Cutillo v. Cinelli*, 485 U.S. 1037, 108 S.Ct. 1600 (1988). Justice White, joined by the Chief Justice and Justice O'Connor, dissented from the denial of certiorari while advancing the need for review and clarification because of circuit conflicts involving Sixth Amendment intrusions and the question of which party bears the burden of persuasion, *viz.*, prejudice, 485 U.S. at 1038.

The circuit conflict was recently considered by the Tenth Circuit in *Shillinger v. Haworth*, 70 F.3d 1132, 1140-43 (10th Cir. 1995). In *Shillinger*, the court reviewed the grant of § 2254 relief, where a local sheriff remained with *Haworth* and his counsel during pretrial preparation, and communicated some of what he heard to the prosecutor (who subliminally utilized that information during *Haworth's* trial). The warden appealed from the district court grant of § 2254 and the Tenth Circuit affirmed, and remanded for a determination of what relief was appropriate (e.g., standing trial or indictment dismissal). The Tenth Circuit assayed the lack of circuit harmony, explaining, in part, that the Third Circuit ". . . has adopted the rule that intentional intrusions by the prosecution constitute *per se* Sixth Amendment violation," citing *United States v. Levy*, 577 F.2d 200, 210 (3rd Cir. 1978) and *United States v. Costanzo*, 740 F.2d 251, 254 (3rd Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985). The *Shillinger* panel examined decisions from the Second and District of Columbia circuits which held that "prejudice may not be required when an intrusion is intentional, but have not specifi-

cally decided," citing *Briggs v. Goodwin*, 698 F.2d 486, 493, n. 22 (DC Cir. 1982); on rehearing, 712 F.2d 1444 (DC Cir. 1993), *cert. denied*, 464 U.S. 1040 (1984)[10] and *United States v. Morales*, 635 F.2d 177, 179 (2nd Cir. 1980). The First, Sixth and Ninth Circuits have held that something beyond intentional intrusion itself is required to rise to the level of a Sixth Amendment violation, citing *United States v. Mastroianni*, 749 F.2d 900, 907 (1st Cir. 1984); *United States v. Steele*, 727 F.2d 580, 586 (6th Cir. 1984), *cert. denied*, 467 U.S. 1209 (1984); *United States v. Glover*, 596 F.2d 857, 863-64 (9th Cir. 1979), *cert. denied*, 444 U.S. 857 and 444 U.S. 860 (1979). The position of the Eighth Circuit was noted in *United States v. Davis*, 646 F.2d 1298, 1303, n. 8 (8th Cir. 1981) ("It is certainly true that where there is gross misconduct on the part of the government no prejudice need be shown. See *O'Brien v. United States, supra*, 386 U.S. at 345, 87 S.Ct. at 1158; *Black v. United States, supra,* 385 U.S. at 29, 87 S.Ct. at 192.").

---

[10] In *Coplon v. United States*, 191 F.2d 749 (DC Cir. 1951), a divided panel vacated the denial of Rule 33 relief and remanded for plenary evidentiary hearings. Post-trial, Ms. *Coplon* alleged that she and her attorney had been the subject of telephonic wiretapping, both prior to and during her trial. The reversing panel, while directing post-trial hearings, noted that Sixth Amendment prejudice would be presumed, and a new trial ordered in the event she was able to sustain her claim that communications with her attorney had been the subject of interception. The panel referred to the Court's opinion in *Glasser v. United States*, 315 U.S. 60, 76, 62 S.Ct. 457 (1942), for the proposition that the right to have ". . . the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial . . .," 191 F.2d at 759-60.

Apropos of the vexing burden of proof question, the Court's decision in *Murphy v. Waterfront Com'n of New York Harbor,* 378 U.S. 52, 84 S.Ct. 1594 (1964), provides insight. The Court explained:

> Second, there are no real proof problems in this situation. *As in the analogous search and seizure and wiretap cases—where the burden of proof is on the Government once the defendant establishes the unlawful search or wiretap. . . .*

378 U.S. at 103 (ital.emph. added; additional text omitted).[11]

On petitioner's direct appeal, the Seventh Circuit opinion noted that the defense could have (1) argued that no showing of prejudice was required or (2) presented some evidence of prejudice, *United States v. DiDomenico (Infelise),* 78 F.3d 294, 300-01 (7th Cir. 1996) (Posner, J.), *cert. denied,* 519 U.S. 1006 (1996). Though petitioner presented no evidence of prejudice, on September 20, 1991, during one of the several pretrial skirmishes on the MCC attorney-eavesdropping issue, one of the defense lawyers pointed out that if [the] intrusion was intentional (flagrant), taint need not be shown (Tr. of 9/20/91 at pp. 14-16). Thus petitioner clearly argued to the district court that the intentional intrusion by the government into the attorney-client relationship obviated the need to show prejudice—at

---

[11] In *Murphy*, Justice White cited to *United States v. Coplon*, 185 F.2d 629 (2nd Cir. 1950) and *United States v. Goldstein*, 120 F.2d 485, 488 (2nd Cir. 1941). In *Goldstein*, Circuit Judge Learned Hand established that in the area of wiretapping the burden of persuasion should remain with the government, 120 F.2d at 488.

least for the purpose of warranting an evidentiary hearing. Thus, the panel opinion was simply mistaken.

In all events, petitioner's case involves the alleged intentional intrusion into the attorney-client privilege and thus constitutes a per se Sixth Amendment violation under the holdings of the Second, Third, Eighth and D.C. Circuits. However, according to the First, Sixth, Seventh and Ninth Circuits something beyond the [intentional] intrusion is required to sustain a Sixth Amendment violation.

CONCLUSION

This petition presents an important and unresolved Sixth Amendment question on which the circuits are divided. Petitioner submitted evidence of unlawful electronic governmental intrusion into his trial preparation while a federal pretrial detainee. Geographical happenstance should not dictate the constitutional resolution.

The petition for certiorari should be granted.

Respectfully submitted,

ALLAN A. ACKERMAN, Esq.
Counsel of Record
2000 N. Clifton Avenue
Chicago, Illinois 60614
(312) 332-2891

Attorney for Petitioner

APPENDIX

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted January 7, 2000
Decided March 1, 2000

Before

Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. DANIEL A MANION, *Circuit Judge*

No. 99-1468

ROCCO E. INFELISE,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 C 8277—Ann Claire Williams, *Judge*.

ORDER

Petitioner moved to vacate, correct, or set aside a sentence pursuant to 28 U.S.C. § 2255. The district court denied the motion and declined to issue a certificate of appealability. Petitioner now has filed a request for a certificate of appealability.

This court has reviewed the final order of the district court and the record on appeal. None of the issues identified in Infelise's request for a certificate of appealability is constitutional; all appear to rest on a statute or common law principle. Therefore, none is eligible for a certificate of appealability. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

App. 3

[Dated January 5, 1999]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROCCO ERNEST INFELESE,	)	
	)	
Plaintiff,	)	
v.	)	Case No. 97 C 8277
	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Pursuant to 28 U.S.C. § 2255, Rocco Infelise ("Infelise") moves to vacate, set aside, or correct his sentence. Infelise also moves to supplement his § 2255 petition with new arguments. For the reasons set forth below, the court grants Infelise's motions for leave to supplement his § 2255 motion and denies Infelise's §2255 motion in its entirety.

Background

Infelise and twenty other defendants were charged with RICO offenses they committed as members of an organized crime group know as the Ferriola Street Crew ("the Crew"). The Crew dabbled in various illegal activities including, but not limited to, extortion, gambling, loan sharking, bookmaking, bribery, and murder. The criminal RICO prosecution primarily focused on the

Crew's attempts to extort protection money, or "street tax," from bookmakers not connected with the Crew; however, the trial also revealed that Infelise and other members of the Crew were involved with the murder of a non-Crew bookmaker named Hal Smith ("Smith"). In a scene closely akin to many Hollywood movies depicting mafioso-style organized crime, Smith's body was eventually found in the trunk of his car—Smith had been tortured and strangled.

Infelise was tried together with other Crew defendants and found guilty on most counts of the indictment. Like the other defendants, the court sentenced Infelise to a long prison term. After sentencing, Infelise appealed his conviction and sentence. Finding no error, the Seventh Circuit affirmed Infelise's conviction and sentence in all respects. *United States v. DiDomenico*, 78 F.3d 294 (7th Cir. 1996). Infelise then filed a petition for a writ of certiorari with the United States Supreme Court, which the Court denied. *DiDomenico v. United States*, 117 S. Ct. 507 (1996). Infelise then filed this § 2255 federal habeas corpus petition and subsequently moved to supplement his § 2255 motion with additional issues.

Analysis

Infelise moves the court to vacate his conviction and sentence pursuant to 28 U.S.C. § 2255, which provides that a prisoner may move the court to vacate, set aside, or correct a sentence if (1) the sentence was imposed in violation of the Constitution or United States laws; (2) the court was without jurisdiction to impose the sentence, or (3) the sentence was in excess of the maximum

authorized by law, or is otherwise subject to collateral attack. Before reaching the substantive issues raised in Infelise's § 2255 motion, however, the court must resolve Infelise's "motion" that the court recuse itself from considering Infelise's § 2255 motion.

I. Infelise's Motion to Recuse

Within the body of his § 2255 petition, Infelise argues that this judge should recuse herself because Infelise "feels [that this court's evaluation of his § 2255 motion] is unfair to him." According to Infelise, this court cannot treat his § 2255 motion fairly because the court knew of an FBI investigation into death threats directed at this judge that may have originated with Infelise or members of the Crew. Citing the investigation of these death threats as the source of bias, Infelise invokes two separate federal statutes requiring judicial recusal. Infelise first asserts that this court is biased against him and must therefore recuse under 28 U.S.C. § 144. Alternatively, Infelise insists that because an objective observer would question this court's impartiality towards him, the court must recuse under 28 U.S.C. § 455.

28 U.S.C. § 144 requires a federal district judge to be removed from a case if that judge "has a personal bias or prejudice either against [one party] or in favor of any adverse party . . . ." In addition to this showing of judicial bias, § 144 also requires the moving party to file a timely motion for recusal, an affidavit stating the facts and the reasons for the belief that bias or prejudice exists, and a certificate of counsel of record stating that the motion is made in good faith. 28 U.S.C. § 144; *United States v.*

Balistrieri, 779 F.2d 1191, 1199 (7th Cir. 1985). "A section 144 affidavit is not timely filed unless filed 'at the earliest moment after the movant acquires knowledge of the facts demonstrating the basis for such disqualification.'" *United States v. Sykes*, 7 F.3d 1331, 1339 (7th Cir. 1993) (quoting *United States v. Patrick*, 542 F.2d 381, 390 (7th Cir. 1976)).

In this case, Infelise filed an affidavit with his § 2255 motion stating that he did not threaten this court and that he "realistically fear[ed]" that he would not receive fair and impartial treatment from this court. (Infelise Aff. at ¶ 3.) After the government pointed out that Infelise's attorney failed to file a certificate of good faith filing, Infelise's counsel certified the affidavit in an unsigned footnote. (Def.'s Reply at 6, n. 9.)[1] Because the procedural steps of § 144 are strictly applied, the court does not believe that an after-the-fact footnote in a pleading constitutes an certificate of counsel under § 144. Additionally, Infelise has failed to explain why he did not file his motion for recusal immediately after learning of the government investigation into the alleged death threats. The record shows that Infelise has known of the investigation since June 3, 1997; however he did not ask the court to recuse itself until more than five months later. Because counsel failed to submit a proper certificate of good faith filing, and Infelise has offered no explanation for waiting so long to seek the court's recusal, the court finds that Infelise has failed to comply with the

---

[1] "Def.'s Reply" is the court's abbreviation for Infelise's far more colorful title, "An Infelise Answer to the Government's Dismissal Importunings."

procedural requirements of § 144. These procedural grounds alone justify the denial of Infelise's § 144 recusal motion.

Assuming, arguendo, that Infelise did satisfy the "strict procedural requirements of § 144," *Balistrieri*, 779 F.2d at 1202, Infelise fails to show that this court is biased against him or in favor of the government. Because the standard of "personal bias or prejudice" bears the same meaning under both 28 U.S.C. §§ 144 and 455, *United States v. Boyd*, No.89 CR 908, 1995 WL 656691, at *1 (N.D. Ill. Nov. 6, 1995) (citing *Balistrieri*, 779 F.2d at 1202), the court will simultaneously analyze its purported bias under both statutes.

To trigger recusal for bias or prejudice, the court must find that a reasonable person would be convinced that the judge is biased." *Balistrieri*, 779 F.2d at 1202. Both §§ 144 and 455 are concerned with the appearance of bias, not actual bias. *Liteky v. United States*, 114 5. Ct. 1147, 1153 (1993). The recusal statutes are "not intended to protect litigants from actual bias in their judge but rather to promote public confidence in the impartiality of the judicial process." *Boyd*, 1995 WL 656691, at *2 (citing *Ballistrieri*, 779 F.2d at 1204). The test is "'whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt that justice would be done in the case.'" *Boyd*, 1995 WL 656691, at *2 (quoting *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 460 (7th Cir. 1985); *see also United States v. Murphy*, 768 F.2d 1518, 1538 (7th Cir. 1985) (A judge need not recuse herself unless an objective and disinterested observer

would conclude that the judge harbored an improper bias against the petitioner.).

In rare cases, a defendant's alleged death threats against a judge may provide evidence of bias warranting recusal absent a formal recusal motion. *United States v. Yu-Leung*, 51 F.3d 1116, 1119-20 (2d Cir. 1995) (citing *United States v. Greenspan*, 26 F.3d 1001, 1005-07 (10th Cir. 1994)). However, recusal is not required simply because the trial judge became aware of a defendant's alleged death threats directed at the court. *Compare Yu-Leung*, 51 F.3d at 1119 (alleged death threats did not warrant recusal) and *People v. Hall*, 626 N.E. 2d 131, 136 (Ill. 1993) (judge who was physically attacked by defendant not required to recuse himself during post conviction proceedings) *with Greenspan*, 26 F.3d at 1006 (under unique circumstances of the case, defendant's conspiracy to murder judge warranted recusal).

In *Yu-Leung*, the Second Circuit held that a district court judge who was notified that the defendant had allegedly threatened to kill the judge was not obligated to recuse himself. 51 F.3d at 1119. The situation was remarkably similar to the instant case. As in *Yu-Leung*, Infelise allegedly threatened the life of the judge and the government notified the court of the threat. Further, in both cases, the government made the district judge aware of the threats, and that it had investigated the matter. Significantly, the Second Circuit noted that neither the government nor the judge considered the threats to be serious. 51 F.3d at 1120. Similarly, in this case the alleged threats were never substantiated, viewed as serious by the F.B.I., or considered realistic by this court. Moreover, Infelise has denied any involvement

with the threats and this court has accepted Infelise's denial of involvement as true. Based on the facts of this case, no reasonable person would conclude that the alleged threats caused this court to harbor any bias or prejudice towards Infelise.

Contrary to Infelise's assertion, this case is not similar to *Greenspan*. In *Greenspan*, the court found that recusal was required because "[t]he judge obviously took the [death] threat very seriously, and chose to accelerate court procedures in order to reduce the risk to him and his family as he perceived it." 26 F.3d at 1007. In addition to expediting the defendant's sentencing hearing, the trial judge also denied the defendant's motion for a continuance. *Id.* at 1006. Because the district court's actions manifested an apparent belief in the genuineness of the death threats, the Tenth Circuit held that an objective observer would conclude that the trial judge may have been impartial. *Id.* at 1007.

In stark contrast to the facts in *Greenspan*, this court has never taken the alleged threats seriously. Similarly, unlike the district court in *Greenspan*, this court has never strayed from normal procedures throughout Infelise's case to reduce any perceived risk. The government submitted an *in camera* chronology of the threat investigation to this court on December 10, 1997. As this court has already stated on numerous occasions, this judge believed that the alleged death threats were without merit and did not warrant an investigation. Moreover, Infelise has denied involvement in any death threats against the judge. Further, after an inconclusive investigation, the FBI decided not to pursue the matter any further. Therefore, since this court and all parties

agree that any alleged death threats from Infelise were without merit, the court denies Infelise's motion to recuse under both § 455 and § 144.

II. Statute of Limitations

Before the court can turn to the substantive issues set forth in Infelise's § 2255 motion, the court must first resolve an argument raised by the government. Specifically, the government contends that Infelise's § 2255 motion is barred by the applicable statute of limitations. The court disagrees with the government's argument and holds that Infelise's § 2255 motion is timely filed.

On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Among other things, the AEDPA created a statute of limitations for the filing of federal habeas corpus petitions. In relevant part, the AEDPA amended 28 U.S.C. § 2255 by providing that "[a] 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of – (1) the date on which the judgment of conviction becomes final . . . ." 28 U.S.C. § 2255. In *United States v. Gendron*, 154 F.3d 672, 674 (7th Cir. 1998), the Seventh Circuit held that "federal prisoners who decide not to seek certiorari with the Supreme Court will have the period of limitations begin to run on the date this court issues the mandate in their direct criminal appeal." *Id.* The *Gendron* court did not, however, address the legal issue in this case—whether § 2255's statute of limitations is suspended for a federal prisoner who *does* seek a writ of certiorari from the Supreme Court.

As *Gendron* noted, the Supreme Court has traditionally defined a final criminal judgment as the date "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffin v. Kentucky*, 479 U.S. 314, 321 p.6 (1987) (citing *United States v. Johnson*, 457 U.S. 537, 542 n.8 (1982)); *see also United States v. Simmonds*, 111 F.3d 737, 744 (10th Cir. 1997) (holding that statute of limitations for a § 2255 motion begins to run on the date that the United States Supreme Court denies certiorari); *Dietsch v. United States*, 2 F.Supp. 2d 627, 635-636 (D.N.J. 1998) (discussing differing approaches to finality questions.)

The government argues that final judgment was rendered on May 31, 1996, when the Seventh Circuit denied Infelise's petition for rehearing *en banc*. In contrast, Infelise argues that his final judgment was rendered when the Supreme Court denied his petition for a writ of certiorari on December 2, 1996. The court agrees with Infelise's approach, which is supported by logic, fundamental fairness, and the applicable case law. The court will therefore determine whether Infelise's § 2255 motion is barred by the statute of limitations using the December 2, 1996 date the Supreme Court denied his petition for a writ of certiorari. Because Infelise filed his habeas petition on November 26, 1997, less than one year after December 2, 1996, Infelise's § 2255 motion is not barred by the statute of limitations.

III. Infelise's Substantive Arguments

In his original § 2255 motion, Infelise advances four substantive arguments.[2] Specifically, Infelise argues that he is entitled to relief under § 2255 because (1) his conviction and sentence were tainted by unlawful electronic eavesdropping on his attorney-client communications while he was incarcerated and awaiting trial at the Metropolitan Correctional Center ("M.C.C."), the federal prison in Chicago, Illinois; (2) the jury's verdict was not unanimous or correct; (3) the court violated his Fifth Amendment rights when it sentenced him to maximum consecutive sentences; and (4) the sentence he received was in excess of that mandated by law. The government argues that Infelise is procedurally barred from raising these arguments in his § 2255 motion because he raised each of them in his direct appeal.

---

[2] In his first reply brief, Infelise raises an argument regarding the use of an anonymous jury. Infelise indicated that he would seek leave to supplement his § 2255 motion with this issue. However, the jury anonymity issue was entirely absent in Infelise's supplemental motion and Infelise has never formally requested leave to add this issue to the ever-growing list of "supplemental issues" to his § 2255 motion. Therefore, since Infelise first raised the argument in a reply brief and has never obtained leave of court to raise the issue, the court will not consider it. In any event, if the court allowed Infelise to tack this argument on to his § 2255 motion, the court would dismiss it as procedurally barred because the Seventh Circuit already rejected the issue during Infelise's direct appeal. *See United States v. DiDomenico*, 78 F.3d 294, 301-02 (7th Cir. 1996). If this argument is not procedurally barred, then it is totally without merit.

A § 2255 motion is "neither a recapitulation of nor a substitute for a direct appeal." *McCleese v. United States*, 75 F.3d 1174, 1177 (7th Cir. 1996). Thus, a federal prisoner may not use § 2255 as a vehicle to circumvent decisions made by the appellate court in a direct appeal. *United States v. Frady*, 456 U.S. 152, 165 (1982); *Doe v. United States*, 51 F.3d 693, 698 (7th Cir. 1995). Accordingly, in a § 2255 motion, a defendant cannot raise (1) issues raised on direct appeal, absent a showing of changed circumstances; (2) nonconstitutional issues that could have been but were not raised on direct appeal; and (3) constitutional issues that were not raised on direct appeal, unless the § 2255 petitioner demonstrates cause for the procedural default as well as actual prejudice from the failure to appeal. *Belford v. United States*, 975 F.2d 310, 313 (7th Cir. 1992), *overruled on other grounds by, Castellanos v. United States*, 26 F.3d 717, 719-20; *Norris v. United States*, 687 F.2d 899, 900 (7th Cir. 1982); *United States v. Herrera*, 918 F.Supp. 243, 246 (N.D. Ill. 1996).

In his original § 2255 motion, Infelise first argues that his conviction and sentence were tainted by unlawful electronic eavesdropping on his attorney-client communications while he was incarcerated and awaiting trial at the M.C.C. The court finds that Infelise is procedurally barred from raising this issue in his § 2255 motion because he raised it on direct appeal. In that direct appeal the Seventh Circuit carefully and extensively considered the issue, found no error, and rejected the same arguments Infelise now raises in his § 2255 motion. See *United States v. DiDomenico*, 78 F.3d 294, 298-301 (7th Cir. 1996). Because Infelise previously asserted this iden-

tical issue on direct appeal, he is procedurally barred from rearguing the point in his § 2255 motion. See *Belford*, 975 F.2d at 313; *see also Olmstead v. United States*, 55 F.3d 316, 319 (7th Cir. 1995) ("in the absence of changed circumstances of fact or law, we will not reconsider an issue which was already decided on direct appeal.").

Infelise attempts to evade this procedural default by offering the affidavit of Daniel Otto ("Otto"), a now-convicted felon who worked as a private security officer charged with transporting Infelise to and from the M.C.C. after the bugging incident. In his affidavit, Otto states that he was in an office building room at 3:00 a.m. with Federal Marshals and F.B.I. agents the day that Infelise was supposed to meet with his attorneys in the same room. According to Otto, he was there to "chose a location where [his] men would be stationed to prevent escapes or disturbances." (Otto Aff. at ¶ 7.) Otto states that while present in the room,

> there were technicians from the FBI who were doing something with the walls or windows of the office. I could not determine what, in fact, they were doing, but they appeared to be placing something into the interior walls and window sashes which faced Jackson Boulevard. These men were not part of my team, nor were they part of the U.S. Marshals Service and were identified to me as being technicians for the FBI.

(*Id.*) Otto also stated that U.S. Marshal Charles Schue ("Schue") asked Otto to eavesdrop on Infelise's conversations while transporting Infelise and report the substance of the conversations back to Schue. (*Id.* at ¶¶ 4-5).

Finally, Otto asserts that Schue said that Infelise was being transported to this room outside the M.C.C. so that defendants could meet in a place outside the MCC to prepare for trial with their attorneys because agents of the federal government had been caught bugging the defendants at the MCC." (*Id.* at ¶ 3.)

As noted, Infelise is procedurally barred from raising the M.C.C. bugging issue in his § 2255 petition "in the absence of changed circumstances of fact or law." *Olmstead*, 55 F.3d at 319. Because Infelise now introduces the Otto affidavit, the court presumes that Infelise intends to argue that changed circumstances of fact warrant the court's review of the M.C.C. bugging issue.[3] The court must therefore determine whether the information contained in the Otto affidavit constitutes "changed circumstances of fact" under the Seventh Circuit's decisions in *Olmsted, Belford*, and *Norris*.

"To the extent that [a § 2255] petition is based on newly discovered evidence, the defendant must also show that due diligence on his part could not have revealed the evidence prior to trial." *United States v. Scherer*, 673 F.2d 176, 178 (7th Cir. 1982); *United States v. Hedman*, 655 F.2d 813, 814-15 (7th Cir. 1981); *see also United States v. Hope*, No. 92 C 6654, 1993 WL 135751, at *3 (N.D. Ill. April 28, 1993) ("When a petitioner presents new evi-

---

[3] The court is forced to make this presumption because Infelise does not explicitly argue in any of his briefs that the Otto affidavit constitutes changed circumstances of fact. Infelise's papers seem more concerned with directing derogatory comments at the federal government than they do with the business of advocating legal arguments.

dence in support of a request for post-conviction relief under § 2255, he must show that he could not have produced the evidence at trial without due diligence."). In this case, as the Seventh Circuit explained, Infelise was given more than ample opportunity to uncover any evidence concerning the alleged M.C.C. bugging before trial. See *DiDomenico*, 78 F.3d at 300-01. This court directed the government to furnish defendants with a list of all employees who had access to the meeting room at the M.C.C., and gave the defendants' lawyers subpoena power to compel the presence of witnesses at a hearing before this court. The court scheduled a hearing and the government indicated that it was ready to proceed with the hearing. Defendants, however, repeatedly delayed the evidentiary hearing and did not again request the hearing until four months after the jury found them guilty and ten months after the originally scheduled hearing date. *See id.* at 300. In these circumstances, Infelise has failed to show that due diligence on his part could not have revealed this evidence prior to trial. Accordingly, because Infelise could have previously discovered this evidence through the exercise of due diligence, Infelise is procedurally barred from asserting the M.C.C. bugging issue in his § 2255 motion.

Infelise next argues that he is entitled to relief under § 2255 because the jury's verdict was not unanimous or correct. However, Infelise is procedurally barred from raising this argument because he asserted the identical argument in his direct appeal. *See DiDomenico*, 78 F.3d at 302. Unlike the M.C.C. bugging issue, Infelise does not even attempt to show changed circumstances of fact or law upon which the court could base another review of

this issue. The court therefore holds that Infelise is procedurally barred from raising this issue because he raised this issue in his direct appeal and fails to show changed circumstances of fact or law.

Infelise next argues that his Fifth Amendment rights were violated when the court sentenced him to maximum consecutive sentences. On this point, poor advocacy again forces the court to speculate as to the legal argument Infelise intends to advance. Amazingly, *in its entirety*, Infelise's argument on this issue states:

> **Ground Four:** Petitioner asserts that the court's imposition of maximum consecutive sentences comprises a continuing Fifth Amendment violation.

This is Infelise's entire argument, or, more appropriately, Infelise's ***legal conclusion***. Infelise supplies no factual basis for this conclusion. Infelise gives no legal authority to support this conclusion. Infelise provides no reasoned analysis upon which to base this conclusion. No court should have to waste its already strained time and resources attempting to guess what legal argument a party is trying to make or how that legal theory applies to the facts of the case before the court.

Nevertheless, in an abundance of caution, the court presumes that Infelise is attempting to resurrect yet another argument that he already made on direct appeal and that the Seventh Circuit already shot down. That is, the court presumes that Infelise means to argue that his sentence is unlawful because the court sentenced him to consecutive terms of years without a jury recommendation. Infelise is, however, procedurally barred from

raising this argument because he raised the identical issue on direct appeal and the Seventh Circuit dismissed it without comment, other than to call it "frivolous." *See DiDomenico*, 78 F.3d at 298. This court therefore holds that Infelise is procedurally barred from asserting this argument in his § 2255 motion because he makes no showing of changed circumstances of fact or law on this issue.

Infelise's final argument in his original § 2255 motion states that "[t]o the extent applicable, [he] adopts the sentencing argument submitted by Louis Marino." In essence, this argument repeats yet another complaint Infelise has previously raised before the Seventh Circuit. The principle argument is that this court should not have determined for sentencing purposes that the defendants participated in a conspiracy to murder Smith, when the jury did not return a guilty verdict for that conspiracy. On direct review, the Seventh Circuit rejected this argument as contrary to the law of the circuit. *DiDomenico*, 78 F.3d at 304. Because Infelise has failed to make a showing of changed circumstances of fact or law concerning this argument, he is procedurally barred from raising this issue in his § 2255 motion.

IV. Infelise's Motions to Supplement

Since filing his original § 2255 motion, Infelise has filed two motions to supplement his pending § 2255 motion that raise additional substantive arguments. The government argues that the court should not consider these supplemental arguments because they constitute second

or successive petitions under 28 U.S.C. § 2255. Paragraph eight of § 2255 was amended by the AEDPA to incorporate the following requirements: "[a] second or successive motion must be certified . . . by [the] court of appeals to contain (1) newly discovered evidence that, . . . in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found the movant guilty of the offense; or (2) a new rule of constitutional law." 28 U.S.C. § 2255.

"The idea behind § 2255 ¶ 8 is that a prisoner is entitled to one, but only one, full and fair opportunity to wage a collateral attack." *O'Connor v. United States*, 133 F.3d 548, 550 (7th Cir. 1998). In cases such as this where a prisoner has a § 2255 motion pending and the court has yet to rule on the petition, courts frequently allow prisoners to add issues to their original § 2255 motion. *See, e.g., United States v. Holguin*, 16 F.Supp.2d 595, 597 (D. Md. 1998) (considering issues in both pending § 2255 motion and supplemental motion filed nine months later).[4] Here, Infelise has not filed any prior § 2255 motions and Infelise sought leave of court to file his motions to supplement. Finally, prior to this Memorandum Opinion and Order, the court has not ruled on the merits of Infelise's § 2255 motion. The court therefore concludes that because there has been no disposition on the merits of Infelise's original § 2255 motion, the mo-

---

[4] Neither the government's briefs, nor this court's own research, reveal any cases in which a court has denied a motion to supplement a § 2255 petition where the original motion remained pending before the court.

tions to supplement are not second or successive petitions requiring certification from the Seventh Circuit.

While the court finds that Infelise's motions to supplement his § 2255 petition are not second or successive petitions, this finding does not save the arguments in those motions from certain doom. Specifically, Infelise's first motion to supplement argues that the court should reduce his sentence because the court's sentence is the functional equivalent of a life sentence. This argument fails for two very fundamental reasons. First, arguments, such as this, that are based on the court's application of the United States Sentencing Guidelines are not cognizable in a § 2255 motion. *See Scott v. United States*, 997 F.2d 340, 342-43 (7th Cir. 1993). In any event, even if this argument did fall within the scope of § 2255, Infelise is procedurally barred from raising it because it is a nonconstitutional issue that he could have but did not raise at trial or on direct appeal. *See Belford v. United States*, 975 F.2d 310, 313 (7th Cir. 1992), *overruled on other grounds by, Castellanos v. United States*, 26 F.3d 717, 719-20; *Norris v. United States*, 687 F.2d 899, 900 (7th Cir. 1982); *United States v. Herrera*, 918 F.Supp. 243, 246 (N.D. Ill. 1996). Because Infelise's claim is not cognizable under § 2255, and he has waived review of it, the court rejects Infelise's argument that his sentence should be reduced because of his age.

In his second motion to supplement his § 2255 petition, Infelise argues that he is entitled to relief based on *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998) and *United States v. Lowery*, 15 F. Supp.2d 1348 (S.D. Fla. 1998). Both Singleton and *Lowery* held that the

government violates 18 U.S.C. § 201(c)(2) if it offers to help a witness obtain a lesser prison sentence in exchange for truthful testimony. Infelise argues that this court should apply these holdings to his case because the government cut a deal with witness William Jahoda, whose testimony was instrumental in securing Infelise's conviction.

This court joins the overwhelming majority of other courts to consider this argument and reject it as patently incorrect. *See, e.g., United States v. Haese*, No. 97-10307, 1998 WL 842185 (5th Cir. Dec. 7, 1998); *United States v. Ware*, 161 F.3d 414 (6th Cir. 1998); *United States v. Revis*, 22 F. Supp.2d 1242 (N.D. Okla. 1998); *United States v. Reid*, 19 F. Supp.2d 534 (E.D. Va. 1998); *United States v. Arana*, 18 F. Supp.2d 715 (E.D. Mich. 1998); *United States v. Moore*, No. 97 C 1781, 1998 WL 778073 (N.D. Ill. Nov. 2, 1998) (Leinenweber, J.). Additionally, as Judge Leinenweber noted in *Moore*, the reasoning of *Singleton* and *Lowery* is inconsistent with the law of the Seventh Circuit. *See United States v. Barrett*, 505 F.2d 1091 (7th Cir. 1975). Thus, because this court believes that the *Singleton* and *Lowery* are incorrect, and those decisions conflict with binding Seventh Circuit precedent, the court rejects Infelise's argument that he is entitled to § 2255 relief based on a governmental violation of 18 U.S.C. § 201(c)(2).

Conclusion

The court grants Infelise's motions to supplement his § 2255 motion and denies Infelise's § 2255 motion to vacate, set aside, or correct his sentence in its entirety.

ENTER:

/s/ Ann Claire Williams
Ann Claire Williams,
Judge

Dated: JAN 5 1999

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 97 C 8277 Date: February 8, 1999

Name of Assigned Judge: Ann C. Williams

Case Title: Infelise v. United States

* * * * *

DOCKET ENTRY:

* * * * *

(10) X [Other docket entry]

(11) X [For further detail see order (on reverse side/of attached to) the original minute order.]

* * * * *

[Reverse Side]

(Reserved for use by the Court)

ORDER

On January 5, 1999, this court entered a Memorandum Opinion and Order denying Rocco Infelise's motion to vacate set aside, or correct his sentence under 28 U.S.C. § 2255. Two days later, *Marino v. United States*, 97 C 7159 into its January 5, 1999 Memorandum Opinion and Order in this case. Infelise now moves the court to issue a certificate of appealability.

Under 28 U.S.C. § 2253(c)(3), this court may issue a certificate of appealability only if the petitioner makes a substantial showing of the denial of a constitutional

right. Infelise seeks a certificate of appealability on four issues. Infelise first asserts that this court should have recused itself from presiding over his § 2255 motion because this judge knew of alleged death threats which were rumored to have come from Infelise. However, as the court explained at great length in its January 5, 1995 Opinion, recusal was not required in this case.

Infelise next contends that he was deprived a fair trial because of the alleged governmental recording of his pretrial communications with his attorneys. As the court explained in its previous two orders, Infelise has procedurally defaulted on this issue because he could have discovered his new evidence through the exercise of due diligence, but failed to do so. In the event that Infelise is not procedurally barred from asserting this issue, the court notes that the Otto affidavit is factually inconclusive and contains inadmissible hearsay. Finally, as the Seventh Circuit observed in his direct appeal, Infelise has failed to show any prejudice from the unsubstantiated "bugging."

Relying primarily on the reasoning in *United States v. Singleton*, 144 F.3d 343 (10th Cir. 1998), Infelise asks the court to issue a certificate of appealability on the issue of whether the government violated is U.S.C. § 201(c)(2) when it cut a deal with William Jahoda to testify against him. What Infelise conveniently fails to mention, however, is that several weeks before Infelise filed his motion for a certificate of appealability, an en banc panel of the Tenth Circuit rejected the holding of the original three judge *Singleton* panel. *See United States v. Singleton*, No. 97-3178, 1999 WL 6409 at *5-6 (10th Cir. Jan. 8, 1990).

In any event, as this court already explained, Infelise's argument is contrary to Seventh Circuit law.

Finally, Infelise claims to have "raised significant sentencing issues, based on decisions reported after [he was] sentenced . . ." Because Infelise does not identify those "significant issues," the court finds no substantial showing of the denial of a constitutional right. In an abundance of caution, the court has carefully reviewed Infelise's several § 2255 filings and the court's previous two orders. In sum, the court finds no substantial showing of the denial of a constitutional right regarding any of the sentencing issues Infelise raised.

In reviewing its orders and Infelise's motions, the court did note one argument that it quite understandably overlooked. Specifically, in one of his reply briefs, Infelise for the first time used the term "ineffective assistance of counsel" and argued that his attorney should have moved for a downward departure of his sentence based on Infelise's age and health. To the extent that this passing mention of ineffective assistance of counsel in a reply brief constitutes an argument, the court rejects it. Having presided over Infelise's trial, being so intricately familiar with the facts of this case, and ultimately sentencing Infelise, this court can say without a doubt that Infelise's attorney did not provide ineffective assistance of counsel by not moving for a downward departure on these grounds. Such a motion would have been denied because of the egregious nature of Infelise's crimes.

The court denies Infelise's motion for a certificate of appealability.

CounterCom

A Division of EPS, Inc.

12115 Self Plaza
Suite 200
Dallas, Texas 75218
(214) 327-9055

September 23, 1991

Mr. Patrick A. Tuite
Patrick A. Tuite, Ltd. Attorneys
105 W. Adams St., 31st Floor
Chicago, IL 60603

RE: Acoustical Investigation
Metropolitan Corrections Center
Chicago, Ill.

Dear Sir:

On September 18, 1991, David Logan and I, the undersigned, traveled to Chicago from Dallas to perform a technical investigation for which you contracted. This report is an interim report describing what service was performed and our conclusions based on those initial tests and observations.

On our arrival at your office Mr. Logan and I was briefed on the existing situation to wit the possession of cassette tapes of recorded conversations being held between several attorneys and their clients. These conversations took place on or about May 20, 1991, between the hours of 5:00 P.M. and 7:30 P.M. in an area designated as an attorney/client conference area. The room is located directly adjacent to the elevator lobby on the 19th floor of the MCC, Chicago.

Mr. Logan and I listened to the two recovered tape recordings and made notes describing sounds and voices

recorded on those tapes. Some items became very apparent. Both tapes had high levels of noise, which may be described as a "ramble" or "roaring" noise. The signal to noise ratio, or the ratio of voice level to background levels, was fairly good on one recording and quite poor on the second recording. The two tapes were basically of the same conversation with one tape starting approximately eight minutes later than the first tape.

We noted the sounds of two different telephone rings, some "squeaking" sounds and some other unidentifiable sounds. However, the predominant sound, excepting the voices recovered, was the rumbling sounds. Mr. Logan and I, both having extensive experience in monitoring and recording conversations, immediately agreed that this sound was probably the result of having a microphone very close to or inside an air duct or that the ambient noise level in the conference room was very high due to mechanical devices such as generators. We believed at that time that the probable cause of the noise was microphone placement in the immediate vicinity of the air duct due to the distinctive sound. This type of audio surveillance is relatively easy, commonly used and effective. However, it is rather unusual to place the microphone in an HVAC feed duct. Most surveillance technicians prefer to place the microphone in the air return system. The movement of air in large volumes will create the type of problem we are listening to on the tapes.

On September 19 we went to the MCC facility where a physical inspection was performed with the intent of locating any existing listening devices and to determine, if possible, where and how the recordings could have

taken place. We were met at the facility by the Warden and by Bureau of Prisons personnel, Lt. Buddy Adelsberger and Criminal Investigator C.H. Mildner III. These two officers accompanied us on our survey. We were also accompanied by Mr. John Mahr of the Joseph Mahr Investigative Agency of Chicago.

Description of the entry and conference room:

The target room is located on the 19th floor of the MCC facility. Access to the room is via the entry control portals located on the first floor. All coats and articles must be locked prior to entering the facility. Additionally, magnetometers leading to the elevators preclude unauthorized equipment from passing this portal. It is totally inconceivable that anyone from the outside could surreptitiously introduce a microphone and tape recorder into this building without official sanction.

The visitor enters the elevator, via a man-trap booth, entry to the various floors are controlled from a remote location.

As you exit the elevator on the 19th floor the conference room is located directly in front of you with only one access portal which is fully controlled by BOP personnel. Upon entering the conference room another door, on the east wall is evident. This door leads to another man-trap and prisoner isolation room.

The room is approximately 15'4" by 2'4" (Drawing A). The walls are constructed of concrete cinder block and the floors and ceilings are constructed of poured reinforced concrete. There are windows on the west, south, and east walls covered by heavy metal bar approximately 1/2" by 1/2". The windows are very dirty and although we had no

instrument to measure light transmittance we suspect the windows are glazed and tinted.

As you exit the elevator on the 19th floor the conference room is located directly in front of you with only one access portal which is fully controlled by BOP personnel. Upon entering the conference room another door, on the east wall is evident. This door leads to another man-trap and prisoner isolation room.

The ceiling cover was an acoustical tile type of material glued to the concrete. There was no air space between the tile and the ceiling structure. All wiring for the lights, electrical outlets, fire alarm sensor and junction boxes was surface mounted and in wiremold. The only exception to this was in the A/C air plenum and located on the west wall and ceiling. There were seven (7) junction boxes installed in the plenum and located along the length of the room with cover plates installed. These junction boxes apparently served as lighting outlets at some other time.

The floors are covered by linoleum type of tile glued to the floor. There was nothing significant about the flooring nor the manner of installation.

Lt. Adelsberger stated that the floors above and below the 19th floor were all the same.

There were three acoustical access paths leading from the conference area into horizontally adjacent areas. The first was the HVAC return path, located on the cast wall. This is nothing more than a metal grate installed in that wall under a window. The opposite side of the grate opens into the prisoner Day Room behind the floor officers desk. The second and third openings noted were

on the north wall. One of these openings, was approximately 24" by 24" and is installed to service the HVAC riser ducts immediately behind the north wall and the plumbing in that area. The second opening was a smaller door, approximately 14" by 14", located next to the west wall, which would allow service personnel to control water service. There were no access ports or acoustical paths leading to the floor below.

The only acoustical path we found which leads vertically is via the air conditioner vents installed in an air plenum located on the west wall and ceiling. The plenum and air outlets extend the entire length of the room.

Overall, the room is hard from an acoustical viewpoint which means that recordings would exhibit some echo effect and makes possible the recovery of conversations at some distance further than a room with softening qualities such as drapes, carpet or clever sound absorbing material. The only sound absorbing material in the room was the ceiling tile and several boxes and cartons located in the room. Ceiling tile installed in this way is not very effective for reducing sound levels as it needs some airspace above the tile for normal use.

Observations and Tests performed:

Because it is obvious that the recordings were illegal by their very nature, we were looking for an acoustical path that would, when monitored or recorded, produce the same type and levels of sound we had aurally examined the day before, and allow some degree of privacy or isolation from the inmates and guards. Our preliminary tests used an electret microphone, audio amplifier and headphones.

As we moved about the conference area listening to the ambient sounds of the room and conversations we noted a total lack of any rumbling or roaring sounds anywhere except when the microphone was placed next to or in the air condition feed vents located on the west wall. Neither did we recover similar sounds when the microphone was placed in direct contact with the walls, windows or flooring. The ambient noise level of the room was very low and we could not detect any mechanical noise of any type either with the unaided ear or with the microphone/amplifier combination.

It was obvious to us at the time that an illegal surveillance could not take place in any horizontal direction using any wired microphone technique. The cinder block construction is very hard to penetrate, would take a lot of time, and there was no place to perform this activity which would not be in direct view of the guards and inmates. We eliminated the floor for attack because there was no acoustical path found to the 18th floor and because the same visual problems would exist on that floor. The only possible location within the building for attack was the acoustical path via the HVAC duct located on the west wall.

We went to the BOP staff offices directly above the conference room. Entry to the offices was through the man-trap system located on the east wall, into the prisoner day room, up one flight of stairs and into three locked offices. We did not see any other ingress or egress portals in this prisoner area. We searched these areas for active monitoring devices and found none.

We immediately noticed the floor vents and suspected that the air duct serviced both the conference area and

the staff offices. The vents, approximately 6" by 35", are installed over the duct system and are removed by simply lifting the vent covers. There are no retaining screws or other mechanical devices to secure the vents to the floor plenum.

When we removed the floor vent covers we observed the air duct below the vent and verified this was the same air space as the conference room. When we placed a sound source in the conference room and listened in the rooms upstairs we were able to recover the sound source aurally. A microphone placed in that air duct as described in Drawing B recovered room audio from the conference room with the amplified sounds being very similar, and effectively identical to the unaided ear, as those sounds on the recovered tapes.

Mr. Mahr also listened to the recovered sounds for witness purpose. The officers would not listen to the recovered sounds for verification.

We took a test recording sample with a portable tape recorder and on playback again the levels, types of sounds and other characteristics were very close to the recordings we had examined the previous day.

We went to the three rooms and found that rooms 2031 and 2030 produced sound levels more consistent with the examined tapes. Room 2030 produced more favorable results, however, this conclusion is very tentative since we were using our memory to compare the sounds of the recovered tapes.

We searched the air duct visually for evidence of previous monitoring activity. We found nothing substantial except that in Room 2031 the felt insulation covering the air

duct had been pulled back about 5" from the southwest top corner of the duct. The glue directly below the felt was dirty and the "damage" was relatively old. There was a cleaned area, about the size of a quarter, directly below the felt which could have been used for a "contact" (as opposed to acoustical) type of microphone.

Conclusions:

Although tentative and somewhat speculative, we believe the recordings took place from within the staff office space directly above the conference area. This is the only area of the building which faithfully reproduced the sounds recorded on the recovered tapes.

Additionally, this is the only area we found in which any privacy could be found by an eavesdropper and is out of view or access to inmates and/or guard personnel. This conclusion does, however, impact the integrity of some BOP personnel since only six keys exist for the offices (per Mr. Mildner) and anyone entering the office areas would require a key for entry.

We noted that security bars were being installed on the air return grates in the doors to these offices. I asked Mr. Mildner the purpose and he stated there had been some burglaries of the offices in which some stamps were stolen with entry via the air return grates.

We do not believe there is any possibility of the defendant's attorneys recording the conversations. First, there is no conceivable way in which a tape recorder could be smuggled past the entry system. Second, it would not seem possible that any person in the conference area could place a recorder anywhere in the room and cause the "rumbling and roaring" sounds recorded on the re-

covered tapes. This would require someone to physically hold a recorder next to the air vents for the entire conversation in total view of inmates and guards.

Additionally, when we listened to the tapes we noted at the very start of the tape recording some sounds, and possible breathing, that are highly consistent with a microphone being handled and placed in the vent after the conversations had started in the conference area. We believe that person or persons unknown was actually installing the recording system after the meeting was started. This would seem to narrow any suspect list to persons on the 19th floor at approximately 5:00 P.M., May 20, 1991.

Although the recovered tapes effectively covered the same meeting they are not identical in quality. One tape was very poor quality with a signal to noise ratio which is very low and borders on the unintelligible. The second tape is of much better quality with an intelligible recovery. We suspect that two recording systems were used simultaneously. This suspicion is further bolstered by an apparent difference in AGC (Automatic Gain Control) activity on the two tapes.

An AGC circuit is common to all tape recorders. Its purpose is to control the level of sound being recorded. An AGC circuit attempts to electronically level all sounds to the recording medium. When a person speaks the AGC will tend to lower background noise and when the person stops speaking the background noise will gradually increase to a higher level. The "attack time", or the time span of changing levels, of two recordings appear to my unaided ear to be different. This would again indicate two separate recording systems.

The time loss of eight minutes between the two tapes seems to suggest a scenario whereby an eavesdropper places one system for recovery and then, according to training, may place a second backup system thereby missing some of the conversation due to the time it takes to install the second system. This is common practice for professional eavesdroppers and law enforcement personnel trained in electronic surveillance.

There is another possible answer to the difference in quality of the two tapes. It is entirely possible that the poor quality tape was the original and only tape recording, and that the second better quality tape is an edited, filtered and electronically enhanced copy of the first tape. Since we do not know what generation of copy was sent to the attorneys, nor what duplication process or editing system was used on the original, we can only speculate.

The last preliminary conclusion regards the technical ability of the eavesdropper. We believe that a person with more than average skill in audio recovery techniques recovered and recorded the attorney/client conversations. Acoustics and the recovery of same is not well understood by laymen and the use of the air feed vent suggests a rather in-depth knowledge of this technique. If a second recorder was used, or if the tapes were electronically enhanced, this again suggests significantly greater knowledge of these techniques than the average eavesdropper possesses. It does suggest technical training such as that given to law enforcement personnel.

We are unable to be more specific, or more conclusive, without extensive electronic examination of the recovered tapes. If you require more exacting evidence I suggest

that the tapes be subjected to electronic examination by a qualified laboratory or technical staff.

We sincerely appreciate your business and we look forward to serving you again.

Respectfully,

Barry E. Cauley

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

AFFIDAVIT OF DANIEL OTTO

Daniel Otto, being first duly sworn, states as follows:

1. In 1991 I was regional director of security for Ogden Allied Security Services, Inc., which had a contract for physical security with the United States Marshal's Office in the Northern District of Illinois.

2. In June of 1991 Ogden Allied Security services got a contract for transportation of federal prisoners. Shortly thereafter, we began transportation of Rocco Infelise, Sal DeLaurentis, Robert Bellavia, Harry Aleman, and at times James Nicholas from the Metropolitan Correctional Center ("MCC") to their respective Lawyers' offices and later to an office on the second floor at West Jackson Boulevard in Chicago.

3. Mr. Charles Schue of the Marshal's Service informed me that the purpose of this transportation was so that the defendants could meet in a place outside the MCC to prepare for trial with their attorneys because agents of the federal government had been caught bugging the defendants at the MCC.

4. I was asked by Mr. Schue if I would eavesdrop on conversations during the period of transportation report to the U.S. Marshals of the conversations that I overheard.

5. I was asked specifically to listen to conversations of Mr. Infelise, Mr. DeLaurentis, Mr. Bellavia and Mr. DiDomenico report them to Mr Schue.

6. I attempted to do so but during the transportation from the MCC to the above locations nothing of any substance was ever said by these individuals and, hence, there was nothing of substance to report.

7. In the early morning hours (approximately 3:00 a.m.) of the first day in which the above named defendants were to be transported to the offices at 19 West Jackson I was present with members of the U.S. Marshal's Office to chose a location where my men would be stationed to prevent escapes or disturbances. While there there were technicians from the FBI who were doing something with the walls or windows of the office. I could not determine what, in fact, they were doing, but they appeared to be placing something into the interior walls and window sashes which faced Jackson Boulevard. These men were not part of my team nor were they part of the U.S. Marshals Service and were identified to me as being technicians for the FBI.

8. While I was incarcerated for the offense of wire fraud, serving an 18 month sentence at the Rochester Medical Center in Rochester, Minnesota, mentioned these facts to another inmate. I was later contacted by Patrick A. Tuite and Mr. Allan Ackerman, who asked to visit me. I gave them permission to see me at Rochester.

9. On March 31, 1997 I related the above information to Mr. Ackerman and Mr. Tuite during a personal visit at the Rochester Medical Center.

10. In late September 1997 I was released to my house and was later visited by Mr. Tuite and his investigator, Joseph Mahr. I related the same information to them. This occurred on October 20, 1997 at about 8:00 p.m.

11. I have received no remuneration or legal services from Mr. Tuite, Mr. Ackerman or anyone connected with the defense.

12. I have not asked for any remuneration or legal services, free or paid, from anyone connected to the defense.

13. I have not been promised any remuneration or legal services, free or paid, from Mr. Tuite, Mr. Ackerman or anyone connected with the defense.

14. During my visit by Mr, Tuite and Mr. Mahr in October 1997 we went to a restaurant as Mr. Tuite said he had not eaten dinner yet. During this meeting Mr. Tuite purchased a soft drink for me.

FURTHER AFFIANT SAYETH NOT.

/s/ Daniel Otto
DANIEL OTTO

SUBSCRIBED AND SWORN to
before me this 20th day of
November, 1997

/s/ Christine E. Elson
NOTARY PUBLIC

[Official Seal]
Christine E. Elson
Notary Public, State of Illinois
My Commission Expires 3-22-2000

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

AFFIDAVIT OF JOSEPH P MAHR

Joseph P. Mahr, being first duly sworn, states as follows:

1. I have been a private detective in the State of Illinois for 36 years and hold Illinois State License No.42 as a Class A private detective.

2. At the request of Patrick A. Tuite I located Daniel Otto who had been released from federal custody.

3. On October 20, 1997 Mr. Tuite and I met with Daniel Otto at his home in Hanover Park and traveled to a nearby restaurant on Barrington Road.

4. Mr. Tuite ate dinner while we interviewed Mr. Otto. Mr. Tuite purchased a soft drink for me and Mr. Otto.

5. I have read Mr. Otto's affidavit and the facts set forth in paragraphs 1, 2, 3, 4, 5, 6, 7, 10, 11, and 12 of that affidavit are what he related to Mr. Tuite and me on October 20, 1997 at the restaurant.

FURTHER AFFIANT SAYETH NOT.

/s/ Joseph P. Mahr
JOSEPH P. MAHR

SUBSCRIBED AND SWORN to
before me this 20th day of
November, 1997

/s/ Christine E. Elson
NOTARY PUBLIC

[Official Seal]
Christine E. Elson
Notary Public, State of Illinois
My Commission Expires 3-22-2000

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 12/6/91

Guy R. Legal, [redacted], telephone [redacted] was telephonically interviewed. Legal, whose date of birth is June 15, 1954 and has a social security account number of [redacted] was formerly employed by the Metropolitan Correctional Center (MCC) as a Security Officer from May 20, 1989 to April 7, 1991. Legal is presently employed by the Department of Defense (DOD), United States Air Force (USAF) as a Ramp security specialist, telephone (312) 825-6224. Legal was advised of the nature and official purpose of the interview and thereafter furnished essentially the following information:

Legal, while employed as a security officer at MCC, had the occasion to work for a total of 60 days on the 19th floor of MCC guarding the defendants in the INFELISE investigation. One defendant, known to Legal as Harry Aleman, once said to Legal that he thought the Federal Bureau of Investigation (FBI) was bugging the room where the INFELISE defendants were meeting with their attorneys on the 19th floor. Legal also recalls Bellavia and DeLaurentis also making similar comments.

Legal worked rotating shifts at MCC and would work on the 19th floor for several days at a time and then be rotated to another area within MCC. Legal recalls that he remembered once seeing a silver colored object hanging from the ceiling in the room where the INFELISE defendants met with their attorneys on the 19th floor.

Legal recalls that if he was looking into the room from the security officer's desk on the 19th floor, the object that he saw would be in the left hand corner of the room on the outside wall of the building. He recalls the object extended approximately 1/8 of an inch from the ceiling and may have been part of a pipe or an object used in the construction of the ceiling in that room.

Legal recalls that there was an area that could be referred to as the 20th floor which housed some offices for the case managers and counselors at MCC. In addition to these offices there was also a restroom on that floor and numerous people had access to that floor. Legal qualified this by saying those having access to the 20th floor would have to be MCC

Investigation on 12/3/91 at Chicago, Illinois File # [redacted]

by SSA John E. Roberts [initialed] JER:jmg
Date Dictated 12/5/91

[redacted]

Continuation of FD-302 of Guy R. Legal, on 12/3/91, page 2

personnel and/or incarcerated individuals at that facility. Legal has no knowledge of any visitor or law enforcement personnel accessing the 20th floor at MCC.

Legal recalls there was a security officer by the name of Caprione (phonetic) who was "good buddies" with the INFELISE defendants. Caprione (phonetic) once told Legal that the FBI had nothing on the INFELISE defendants and the FBI was "a bunch of shit". Legal can recall occasions when Aleman would ask him where Caprione (phonetic) was and to call him (Caprione) so they could meet.

It is Legal's opinion that the room was not bugged and if recordings of conversations were made they could have been done by the attorneys who then gave them to the news media. Legal advised he never knew what the attorneys were bringing into the MCC facility because they were not patted down by security officers when they entered the facility.

At the conclusion of the interview Legal was asked if he ever brought to anyone's attention the object he observed protruding from the ceiling in the room used by the INFELISE defendants and their attorneys. Legal responded that he did not report this information to anyone and never thought anything of the object.